**CENTRAL ADMINISTRATIVE TRIBUNAL**
**AHMEDABAD BENCH, AHMEDABAD**
**Original Application No. 247/17**

**This 25th day of January , 2021**

**CORAM :**
**HON'BLE SHRI JAYESH V BHAIRAVIA, MEMBER (J)**
**HON'BLE DR. A K DUBEY, MEMBER(A)**

1 Bajranglal S/o Kishorlal Meena,
Male, Aged 58 years,
Presently posted as Assistant Commissioner,Customs, Ahmedabad
Residing at:1, Vrindavandham, B/h Smruti Temple,
P.D.Pandya College Road,Ghodasar, Ahmedabad – 380 050.

2 Surjibhai S/o NanjibhaiMenat,
Male, Age 59 years,
Presently posted as Assistant Commissioner,Central Excise Ahmedabad III,
Residng at : A/104, Himalaya Royal,Opp. Wide Angle Cinema,
Off. National Highway,Mehsana – 384002.

3 Ram Sahai S/o DhanphoolMeena,
Male, Age 59 years,
Presently posted as Assistant Commissioner, Central Excise Ahmedabad II,
Residing at: 6, AishwaryaBunglows,Nr. Sadhima Petrol Pump,
Motera Road, Ahmedabad – 380005. … Applicants

By Advocate Shri Joy Mathew

V/s

1 The Union of India,Notice to be served through:
Ministry of Finance, Department of Expenditure,
North Block, New Delhi – 110001.

2 Central Board of Excise and Customs,
Notice to be Served through: The Chairman, CBEC, Ministry of Finance,
Department of Revenue, New Delhi – 110001.

3 The Department of Personnel and Training,
Notice to be Served through:
The Secretary, Department of Personnel & Training,
North Block, New Delhi – 110001.

4 The Pr. Chief Controller of Accounts,
Central Board of Excise & Customs,
Room No.107, A.G.C.R. Building,I.P.Estate,
New Delhi-110002.

5 The Chief Commissioner,
Central Excise, Customs & Service Tax,
Vadodara Zone, Central Excise Building,
Race Course Circle,Vadodara – 390007.

6 The Chief Commissioner,
Central Excise Bhavan,
Opp. Polytechnic L Colony,
Ambawadi, Ahmedabad – 380015. … Respondents

By Advocate Shri H D Shukla

**ORDER (ORAL)**

**Per Shri Jayesh V Bhairavia, Member(J)**

**1** The Hon'ble High Court of Gujarat in Special Civil Application No. 5868 of 2020 and other cognate petitions, (which were preferred against the common-order dated 22.09.2017 of this Tribunal in OA No. 581/2016, OA 133/2017 and other cognate OAs including the present OA 247/2017 decided 28.7.2017), by order dated 9th March, 2020 disposed of the said SCA with following observations remanding the OAs for deciding it afresh, which reads as under:-

> ***"13. We have noticed that although O.A.s have not been entertained as mentioned herein above, in wake of the pendency of the matter for consideration before the Apex Court in case of Union of India vs. M.V.Mohanan Nair and other five SLPs, the Delhi High Court has been followed by the Tribunal where it noticed the different views by different High Courts. The issues raised before the Tribunal in all these original applications concern the interpretation and clarification of grant of 3rd Financial Up-gradations under the MACP to the superintendents by placing them in pay band- III with grade pay of 6600/- who were granted non-functional grade pay of Rs. 5400/- in pay band- II.***
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> ***14. This Court notices that in case of Union of India vs. M.V.Mohanan Nair delivered on 05.03.2020, the Apex Court has upheld the Delhi High Court's view in case of Union of India vs. All India CGHS Employees Association, which upheld the clarificatory communication choosing not to interfere with the policy. We are conscious that the Tribunal has followed the Delhi High Court on law point and the very issue is now addressed and upheld by the Apex Court. However, only on the ground that in case of petitioner, there has been no individual examination in wake of pendency of matter before the Supreme Court, let all the matters be examined by the Tribunal on merits, with whatever the scope is left, as individual examination on merit in each petition would be necessary, even if, the legal issue stands covered, more particularly, since certain directions have been issued by the Apex Court to the Union of India in the very decision, which it is bound to follow, the same shall also needed to be applied in case of each of the petitioners. To deny consideration on merit in individual case may amount to jeopardizing the right to be considered.***

***15. Resultantly, all matters are remanded for fresh consideration on merit in wake of the delivery of the aforesaid decision. This Court has not examined the individual matter on merit which shall be done by the Tribunal expeditiously in not later than six months' period, with the above clarification as mentioned in para (5), from the date of receipt of copy of this order.***

***16. All petitions stand disposed of accordingly. Rule is discharged."***

**1.1** In view of the above directions of the Hon'ble High Court, the present OA along with other identical OAs were taken up for final hearing afresh.

**2.** By filing the present OA, the applicants pray for the following reliefs,

*"(A) Be pleased to allow this Application.*

*(B) Be pleased to quash and set aside Para 8.1 of Annexure I of OM No.35034/3/2008-Estt.(D) dated 19th May 2009 (Ann. A/1) and further be pleased to declare the same to be Ultra vires the MACP Scheme as well as the 6th Pay Commission's Recommendations.*

*(C) Be pleased to quash and set aside Instruction dated 22.06.2015 issued by the Pr. Chief controller of Accounts, CBEC, New Delhi under F.No.Coord/Expdt./O.A.675 of 2013/2015-16 at Ann. A2 to this application.*

*(D) Be pleased to quash and set aside Clarification being F.No. A-23011/25/2015-Ad IIA dated 20/06/2016 at Annex. A3 to this Application.*

*(E) Be pleased to declare that the benefit of Non Functional Grade Pay granted to Group B officers cannot be set-off against Financial Up-gradations under the Modified Assured Career Progression Scheme.*

*(F) Be pleased to declare that the present applicants are eligible to the benefit of 3 rd MACP by way of fixing the pay of the present applicants in PB-3 with pay of Rs. 15600-39,100/- with Grade Pay Rs. 6600/-.*

*(G) Be pleased to direct the respondents not to disturb the benefit of 3 rd MACP in the pay scale of Rs. 15600-39,100/- with Grade Pay Rs. 6600/- in PB-3 to the present applicants.*

**3.** The main grievance of the applicants in this OA is against the decision dated 20.06.2016 of the respondents in treating the Non-functional scale/grade granted to them in Grade Pay of Rs.5400/- in PB - 2 as one financial up-gradation under the provision of Modified Assured Career Progression

Scheme (MACP for short) and thereby the respondents have withdrawn the benefit of 3rd MACP Grade Pay Rs.6600/- in PB-3 granted to the applicants.

**4.** The facts in brief are that all the three applicants in this OA were initially appointed as Inspectors in the year 1982-1984 by way of Direct Recruitment. Thereafter, in the year 1995-1997 they were granted regular promotion to the post of Superintendents. Subsequently, they were promoted as Assistant Commissioners in the year 2014-16.

**4.1** On implementation of the VIth Pay Commission, the Government of India (DOPT) introduced a new scheme vide OM dated 19.05.2009 which is known as MACPS to be given effect from 01.09.2008. It provides for three Financial Up-gradations to those employees who do not get any promotion on completion of 10, 20 and 30 years of regular service.

**4.2** It is stated by the applicants that after introduction of aforesaid MACP Scheme, Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs vide clarification bearing F.No.A-26017/98/2008-Ad.IIA **dated 16.09.2009 (Ann. A/4)** decided that the Superintendents who have completed four years of regular service, are eligible for Rs.5400/- grade pay in pay band 2 as Non-functional up-gradation. Accordingly, the applicants were granted the Non-functional up-gradation in Grade pay of Rs.5400/- in pay band 2 during the period between 1.1.2006 to 31.08.2008. After applicants had rendered 24 years of service, they were also granted scale of Rs.15600-39100 with Grade Pay of Rs.5400/- in PB-3 in the year 2006.

**4.3** Subsequently, on their completion of 30 years of service, the applicants were granted the further financial up-gradation under MACPS and their pay was fixed in the grade pay of Rs.6600/- in the year 2012. However, the Accounts section raised an objection that the officials who had been granted Non-functional financial up-gradation of Rs.5400/- in Pay Band - 2 were not entitled for 3rd financial up-gradation under MACPS. The said 3rd financial up-gradation of Rs.6,600/- in PB-3 granted to such of those officials (Superintendent)

is totally contrary to MACPS and requested the department to withdraw the said benefit.

**4.4** Being aggrieved with the stand of Accounts Department of the respondents one Shri S Balakrishnan alongwith two others officers who were similarly situated to that of the applicants herein had approached the Madras Bench of this Tribunal in OA 280/2012 with a prayer to quash and set aside the order withdrawing the 3rd MACP in the grade pay of Rs.6600/-. It is stated that by taking into consideration the order passed by CAT Chandigarh Bench in OA No.1038/2010 in the case of Rajpal v/s Union of India which came to be upheld by Hon'ble High Court of Punjab & Haryana vide order dated 19.10.2011 in the case of Union of India v/s Rajpal in (WP No.19387/2011), the said OA 280/2012 of S Balakrishnan was allowed in his favour by Madras Bench of this Tribunal vide order dated 22.07.2013. Being aggrieved by the order passed by CAT Madras Bench dated 22.07.2013 **(Annexure A/5),** the Union of India preferred a Writ Petition No. 11535/2014 on the file of the Hon'ble High Court of Judicature at Madras which came to be dismissed by its order dated **16.10.2014 (Annexure A/6).** The SLP (C) No.15396/2015 filed by the Government against the judgment of the Hon'ble High court of Madras came to be dismissed by the Hon'ble Supreme Court by its order dated **31.08.2015 (Annexure A/7)**by observing as under:-

**"Upon hearing the counsel, the Court made the following order:**

**Delay condoned.**

**The Special Leave Petition is dismissed."**

It is further submitted that the review application filed thereon by the Union of India was also dismissed.

**4.5** Further, it is stated that another similarly placed officer, namely, one Shri R Chandrasekaran approached the Madras Bench of this Tribunal in OA 675/2013 seeking the very same reliefs as sought by S Balakrishnan as referred hereinabove. The said OA 675/2013 of R.

Chandrasekaran came to be dismissed on 24.02.2014. Being aggrieved by the order dated 24.02.2014 in OA 675/2013, he preferred a Writ Petition No.19024/2014 on the file of the Hon'ble High Court of Judicature at Madras and vide judgment dated 08.12.2014 the Hon'ble High Court of Madras was pleased to set aside the order dated 24.02.2014 passed in OA 675/2013 and remanded the matter to the Department of Personnel, Public Grievances and Pension for their fresh consideration.

**5.** It appears that pursuant to another order dated 8.12.2014 passed by Hon'ble High Court of Madras in the case of R Chandrasekaran v/s Union of India and Ors in WP No.19024/2014, initially the Government vide a letter dated 26.05.2015 vide Annexure A/9 addressed to the Chief Commissioner of Central Excise, Chennai directed him to implement the order and to grant the third Financial Upgradation in the grade pay of Rs.6600/- to Shri R Chandrasekaran.

5.1 **Subsequently**, the said letter dated 26.05.2015 was withdrawn by Government in their further clarification dated 20.06.2016 vide Annexure A/3 which is impugned herein. **In the said clarification it was also stated** ***that "the grant of Non-functional grade pay of Rs.5400/- in PB-2 to the Superintendents needs to be counted as one financial up-gradation for the purpose of MACP Scheme".***

**5.2** Accordingly, the benefits granted to the said R Chandrasekaran vide order dated 26.5.2015 was treated to have been withdrawn vide above quoted clarification dated 20.6.2016 and all the Controlling Authorities were requested to take appropriate action to settle the MACP cases accordingly.

**6.** Being aggrieved by the impugned decision dated 20.06.2016 Ann. A/3, the applicants had filed the present OA on 22.05.2017 before this Tribunal as the respondents had also taken action in the case of applicants by treating the grant of Non-functional up-gradation as separate Grade Pay under MACPS and decided to withdraw the benefit of 3rd MACP granted to applicants in GP Rs.6600/- in PB-3.

As noted hereinabove, this Tribunal initially vide its order dated

28.07.2017 declined to entertain the present OA by holding that the order passed in S Balakrishnan has not attained finality in view of the fact that the Hon'ble Apex Court in SLP against the said judgment has not passed the order on merits as the said SLP was simply dismissed inlimine.

Further, it was observed by this Tribunal that the SLP No. 7467/2013 preferred against the judgment of Hon'ble High Court of Punjab & Haryana in Rajpal's case (supra) was dismissed vide order dated 15.04.2013 on the ground of delay and laches and the same was dismissed inlimine ***but not on merit***.

It was also observed that order passed in the case of M V Mohanan Nair has direct nexus with the issue involved in the present case and SLP in case of M V Mohanan Nair was pending for consideration before the Hon'ble Apex Court. Accordingly the present OA was initially rejected vide order dated 28.07.2017 with the following observations:-

> *''21 Thus, in view of the decision of the Full Bench in A K Dawar (supra), and by following the judgment in Indian Petrochemicals Corporation Limited (supra), we are free to take our own view to accept the rulings of either of the Hon'ble High Courts of Delhi or the Hon'ble High Court of Madras. At this juncture, we may observe that as already pointed out that though the Hon'ble High Court of Madras in R Chandrasekaran set aside the order of the Tribunal and did not reiterate its findings in S Balakrishnan, on the other hand it remanded the matter to DoPT; whereas on going through the judgment of the Hon'ble Delhi High Court in WP (C) No. 8515/2014 one can find that the Hon'ble High Court has extensively analyzed the MACP scheme and categorically held as*
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> *''that once an employee has got the benefit of time bound promotion or in-situ promotion and have got the higher pay scale, the same has to be counted for Financial Up-gradations under the MACP Scheme.''*
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> *The judgment in Rajpal (supra) of the Hon'ble High Court of Punjab and Haryana stands stayed by the Hon'ble Supreme Court. Therefore, in view of the guidelines in the Full Bench of this Tribunal in A K Dawar (supra), we follow the rulings of Hon'ble High Court of Delhi in WP (C) 8515/2014. However, we would like to mention that this view is pending consideration before the Hon'ble Supreme Court in M V Mohanan Nair (supra) and other four connected SLPs namely*
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> *(i) SLP No.22181/2014- Union of India v/s Reeta Devi*
> *(ii) SLP No.23333/2014-Union of India v/s Babu Ram & Ors*
> *(iii) SLP No.23335/2014-Union of India v/s. O.P.Bhadhani*
> *(iv) SLP (CC) 10436/2014-Union of India v/s Dhirender Singh*
>
> *22For the foregoing, we are of the opinion that judicial discipline demands that we shall not entertain the OA mainly for the*

*following reasons:-*

*(i) that the point that arises for consideration is pending consideration before the Hon'ble Supreme Court in the said (a) SLP No.21803/2014 in Union of India v/s M V Mohanan Nair (supra) and other five SLPs mentioned in the above paragraph.*
*(ii) that the judgments of the Hon'ble High Court of Punjab and Haryana in which Rajpal (supra) was upheld are stayed by the Hon'ble Supreme Court;*
*(iii) there exists conflicting views of different high courts.*
*(iv) We follow the ruling of the Hon'ble Delhi High Court.*

*23 Accordingly we decline to entertain the OA since the same would serve no purpose, particularly in view of the fact that the issue is pending consideration before the Hon'ble Supreme Court and the findings in Rajpal (supra) stands stayed by the Hon'ble Supreme Court. The OA stands rejected. There shall be no orders as to costs."*

**7** Aggrieved by the above order dated 28.07.2017 as also against other identical orders passed by this Tribunal in similar group of OAs, the original applicants have approached the Hon'ble High Court by way of filing SCAs. During the pendency of the said SCAs, the Hon'ble Apex Court decided the pending SLP in the case of M V Mohanan Nair vide judgment dated 05.03.2020 and in light of the said judgment the Hon'ble High Court vide its common order dated 09.03.2020 passed in SCA 5868/2020 alongwith other cognate petitions remanded back all the OAs including the present OA for fresh consideration as indicated in para 13, 14, 15 and 16 of the said order dated 09.03.2020 (referred in para-1 above).

**8** In the backdrop of above facts and circumstances, learned counsel Shri Joy Mathew for the applicants mainly submitted as under:-

**8.1** That the applicants are similarly situated persons to that of said Shri S Balakrishnan and Shri R Chandrasekaran. It is submitted that the Hon'ble High Court of Madras held that para 8 of MACP scheme stipulates that promotions earned in the post carrying same GP in the promotional hierarchy as per the recruitment rules shall only be counted for purpose of MACP. Para no. 8.1 follows para no. 8 of the scheme and therefore it should be treated as a corollary to para no. 8. Accordingly, it was held in the case of S Balakrishnan that he is entitled for benefit of 3rd MACP in PB-3 with GP 6600/-.

It is submitted that, para no. 8.1 would be applicable only to those departments, which provide for promotion to the post carrying the same GP of Rs. 5400/- in band PB – 2. Grade Pay of Rs. 5400/- in band PB – 2 is not the promotional hierarchy as per the recruitment rules of the applicants department.

He further submits that the view taken by the Hon'ble Madras High Court in S Balakrishnan's case (supra) came to be confirmed by the Hon'ble Supreme Court on dismissal of SLP No.15396/2015 by order dated 31.08.2015 in (Annexure A/7). The order passed in the case of S Balakrishnan attained finality and as such the respondents ought not to have issued the impugned orders dated 20.6.2016 and 22.06.2015 at Annexures A/3 and A/2 respectively.

It is submitted that the respondents ought to have adhered to the principle of equality by following the order/judgment passed in the case of S Balakrishnan.

The respondents having taken a conscious decision to implement judgment of Honble High Court of Madras dated 08.12.2014 in R Chandrasekaran (supra) by issuing the letter dated 26.05.2015 vide Annexure A/9, arbitrarily for no reason withdrew the same by the impugned order dated 20.06.2016 vide Annexure A/3. The applicants are entitled to be treated equally and eligible for 3rd MACP.

8.2 It is contended that since the applicants were granted Non-Functional Grade (NFG) in the year 2006, the question of counting the same towards 2nd MACP does not arise because the MACP was introduced in the year w.e.f 01.09.2008. it is also the case of the applicants that vide letter No.F.No.A-23011/29/2010-Ad.IIA dated 20.05.2011 of the CBEC wherein it was contended in para 5 that there would be no effect on grant of NFG in PB-2 with Grade Pay Rs.5400/- during the period from 01.01.2006 to 31.08.2008 as the same is not counted under ACP Scheme and it would not be offset against financial up-gradation under the scheme. However, in terms of para 8.1 of the Annexure of MACPS, financial up-gradation to Grade Pay 5400/- in

PB-2 & PB-3 would be counted separate up-gradation and would be offset against financial up-gradation under the scheme. Therefore, it is submitted by the applicant that the officials who got 2nd ACP and not the 2nd MACP are on different footing and same has been settled by the respondents in favour of the applicant, once the view is taken that NFG is not to be counted, the question does not arise that when 3rd MACP is to be granted, then it can be reviewed differently. Therefore, respondents have erroneously counted the NFG in Pay Band – 2 as separate up-gradation under MACPS and set off it against 2nd MACP. In this regard, learned advocate placed reliance on the order passed by CAT, Principal Bench in OA 2806/2016 dated 26.02.2020 in the case of All India Association of Central Excise Gazzetted Executive Officer, Delhi & Ors v/s Union of India and submitted that in para 22 of said order it is observed that :-

> *"As per current instructions in force, the Superintendents with four years of regular service are to be granted NFU (Non-functional upgradation), in GP Rs.5400/- PB-2., Since this is NFU and not a promotion, it shall not count towards ACP benefit scheme which was in force until 31.08.2008. Accordingly, all such Superintendents who are already granted this NFU to the pay scale of PB-2 + GP Rs.5400/- uptill 31.08.2008, shall continue to be due for 2nd ACP benefit. However, since the new MACP Scheme had come into effect from 01.09.2008, all those who still due for 2nd ACP as on 31.08.2008, shall now be taken to be due for 2nd MACP w.e.f. the date they complete 20 years of total service in case they are not promoted in the meanwhile. This 2nd MACP lies in the next higher pay scale of PB-3 + GP Rs.5400/- as per MACP policy dated 19.05.2009."*

Further in para 22.2 it has been observed that,

> "*once the 2nd MACP gets off set as explained in para 22, all the officials shall be taken to be due for 3rd MACP benefit as per policy to the next higher pay scale, as applicable, on completion of total 30 years of service*."

It is also submitted that the CAT PB Bench in the aforesaid OA, further held that:-

> *"The CBEC letter dated 20.06.2016 does not make a distinction with respect to the date of grant of NFU to the pay scale of PB-2 + GP Rs.5400/- as the relevant date of 01.09.2008 makes a difference due to the respective ACP and MACP Scheme and as brought out in para 21 to 22.2*

*above. Accordingly, the respondents shall review this circular dated 20.06.2016 as a separate exercise and re-issue after incorporating changes as are considered necessary."*

The said OA was disposed of by CAT PB with the direction to the respondents *"to review the case of all the applicants in terms of para 21 to 22.2 and grant them such consequential benefits due to them".*

Therefore, the learned counsel submits that applicant's case is required to be considered in terms of the above order of CAT, PB.

**8.3** He further relied on a decision rendered by the CAT, Jabalpur Bench vide its common order dated 20.09.2018 in OA 849/2016 Rajendra Kumar Vidyarthi & Ors v/s Union of India in which it has been observed that since the judgment passed by the Hon'ble High Court of Madras in the case of R Chandrasekaran is judgment *in rem*, as has been held by the coordinate Bench at Mumbai in the case of Prakash Vasant Ratnaparkhi applicants therein be treated equally. Therefore, it is argued that the applicants herein are also entitled for the similar benefit, as has been extended to R Chandrasekaran.

**8.4** Learned counsel for the applicants also submitted that the common order passed by CAT Jabalpur Bench in OA 849/2016 & Ors, has been upheld by the High Court of Madhya Pradesh, Jabalpur Bench in Misc. Petition No.6500/2019 and other connected matters vide order dated 30.04.2020 wherein it has been observed that :-

*"can a replacement scale in PB 3 i.e. Rs.15600-39100 in the Sixth CPC which is in lieu of the earlier scale of Rs.8000-12500 be termed as financial up-gradation for MACPS ? In view of the above analysis, the answer has to be in negative. Merely because of the implementation of Sixth CPC's recommendation Grade Pay of Rs.5400/- is in two pay bands viz. PB 2 and PB 3, the Grade Pay of Rs.5400 in PB 2 and Rs.5400 in PB 3 is erroneously treated as separate grade pays for the purpose of grant of up-gradations under MACPS. Evidently, the applicants got one promotion and 2nd ACP under ACP 1999 regime prior to implementation of MACPS w.e.f. 01.09.2008, are thus entitled for third MACPS*

*on completion of 30 years of service".*

**8.5** Learned advocate, further placed reliance on the order passed by CAT, Mumbai Bench in OA 633/2015 dated 21.06.2017 in the case of Prakash Vasant Ratnaparkhi & Ors. Vs. Union of India, wherein in Para-20 & 22 it has been observed that :

*"Further, a view has already been taken after due Inter-Ministerial consultations means that the decision is not a decision in personam, but a decision in rem. Hence, having complied with the order of the Hon'ble High Court of Madras, the Judgment of the Hon'ble High Court being a Judgment in Rem leaving no scope for further dilly dallying by respondents to pass a similar order in favour of present applicants not distinguished in the OA by respondents as being dissimilar. The judgment of the Hon'ble High Court of Madras (and Hon'ble High Court of Punjab & Haryana, as referred in the order of the Hon'ble High Court of Madras) has attained finality. ....". Para – 22 :-*

*"In view of the above the impugned order is set aside, as the prayer clause 8 (a) of this OA is liable to be allowed. The respondents are directed to comply with the orders within a period of two months from the date of receipt of certified copy of this order in all the similarly situated persons from among the eleven applicants. Since the matter is pending with DOPT based on a bonafide belief that DOPT would issue clarification/decision, no interest is payable."*

Based on aforesaid order, the learned counsel argue that the applicants herein are entitle to claim benefit of third MAPC in GP Rs. 6000 /-.

**8.6** Learned counsel for the applicants also placed reliance on an order passed by Delhi High Court in Writ Petition (C) 9357/2016 in the case of Hari Ram v/s Registrar General, he emphasis the observation contained in paras 8, 10, 18 & 19 of the said judgment which reads ass under :-

"*8: Learned senior counsel highlights that the MACPS never visualized that the post could have two grade pays as in this case and that an entry of an employee into the second higher grade pay should be treated as an up-gradation. It was emphasized that the grant of non-functional pay scale i.e. higher grade pay of Rs.5400/- is not dependent upon fulfillment of any condition by the officer; nor is there – like in the case of selection grade, a stipulation as to the number of posts that can be granted such higher grade pay. Plainly, every Reader, upon completion of four years service automatically becomes entitled to 5400/- grade pay. Thus, this is an integral part of the pay structure rather than as an up-gradation as was concluded by the Screening Committee, resulting in denial of the benefit."*

**"*10.*** *Learned senior counsel relied upon the judgment of the Division Bench of this Court in F. C. Jain [WP (C) 4664/2001, decided on 18.04.2002] which had indicated broadly how a beneficial scheme such as the ACP ought to be construed and stated further that the fitment into a higher scale of pay ipso facto did not amount to promotion orders to result into a deprivation of ACP benefit. A similar approach was indicated by the Division Bench judgment of the Madras High Court in UOI v/s S Balakrishnan [WP (C) 11535/2014, decided on 16.10.2014]. The Court had then observed that :*

*"16. Since the MACP Scheme was framed in the larger interest of employees, Court should give a liberal construction. The primary attempt in such cases should be to achieve the purpose and object of the policy and not to frustrate it.*

*17. The grade pay in this case was initially granted on non functional basis. The grade pay of Rs.5400/- in PB-2 being non-functional scale, the same cannot be a functional Grade to Assistant Director-II, who got promotion from the post of Enforcement Officer."*

**"18**. *In the present case, it is noticed that the petitioners' counterparts were granted the third Financial Up-gradations, although they, like them were given the GP of 5400/- they perform similar, if not identical functions. FC Jain (supra) is an authority that if such broadly identical functions are involved, both categories ought to be treated alike in regard to interpretation of pay norms, by the organization. Therefore, the principle of parity would result in acceptance of the petitioner's claim. The second aspect that the court emphasized was that unlike "stagnation" or performance based increments, or*

*placement in higher scales, the grant of 5400/- is automatic, after the happening of a certain event, i.e. completion of four years' service. This is quite different from promotion or placement in the selection grade, which is performance dependent or based on the availability of a few slots or vacancies (usually confined to a portion of the entire cadre: say 20%). The last reason is that both V.K.Sharma (supra) and Suresh Chand Garg (supra), in somewhat similar circumstances, accepted that the grant of a higher grade pay did not preclude the grant of the third Financial Up-gradations."*

***"19**. In view of foregoing analysis, the court is of opinion that the petition has to succeed. As a consequence, the respondents are directed to revise and fix the pay scales by granting the third Financial Up-gradations to the petitioners."*

The learned counsel submit that the aforesaid observation of Hon'ble High Court is squarely applicable in the case of present applicants and they are entitle for 3rd MACP in GP Rs. 6000/-.

**8.7** Besides above, the learned counsel for the applicants also argued that the respondents ought not to have treated the Financial Up-gradations under NFG granted to them as a set-off against either ACP or MACP. The said NFG cannot be treated as a promotion since, as per the Recruitment Rules, the Grade Pay of Rs.5400/- in PB-2 is not promotional scale. According to the applicants the NFG granted to them cannot be treated as up-gradation under MACP, as the MACPS came into existence at a later stage w.e.f. 01.09.2008 & the grade pay of Rs.5400/- in PB - 2 was granted to the applicants, prior to implementation of the MACP Scheme.

It is further submitted that the NFG granted to the applicants also cannot be treated as Financial Up-gradation under ACP Scheme, because as per the Board's clarification vide letter No. F.No.A-23011/29/2010-Ad.IIA dated 20.05.2011 (Annexure R/6) it was clarified that the benefits of ACPS of August 1999 had been allowed till 31.08.2008 and only functional promotions are to be counted for the purpose of the Scheme.

It is also argued that there is no provision for counting "Non-functional scale" for the purpose of ACP Scheme. Therefore, the

applicants were eligible for Grade Pay of Rs.5400/- in band PB-3.

Further, it is stated that once the applicants were granted 2nd ACP or 2nd MACP, they are eligible for next higher Grade Pay of Rs.6600/- in Grade Pay hierarchy, as per Para No.2 to the Annexure-1 of the MACP Scheme. In support of these submissions the learned counsel submit relied upon the order passed by the CAT PB, New Delhi in OA No. 2860/2016 dated 26.02.2020.

The learned counsel further submits that under the MACP Scheme three financial up-gradations are allowed on completion of 10, 20 and 30 years of regular service, counted from the direct entry grade. The MACPs envisages nearly placement in the immediate next higher Grade Pay as given in Section – I, Part – A of the First Schedule of the CCS (Revised Pay) Rules, 2008, in case no promotion has been earned by the employee during this period. Therefore, under the scheme of the MACP only the promotions granted are required to be counted and treated as set off against MACP benefits.

He reiterate his submissions that the NFG in GP Rs. 5400/- in PB – 2 is not promotional scale therefore it cannot be treated for the purpose of MACP and as such the said benefit was granted before the MACP Scheme came into existence. Therefore, the para 8.1 of Annexure A/1 to MACP scheme is against the object and spirit of welfare of the officers and same is required to be quashed and set aside.

**8.8** The learned counsel further submits that the case of Union of India v/s M. V. Mohanan Nair reported in (2020) 5 SCC 421 does not deal with NFG and same is only deal with grant of parity in GP. Therefore, the said judgment has no applicability to the present OA.

**8.9** Concluding his arguments, learned counsel Shri Joy Mathew submitted that in his written submission he has reiterated the aforesaid contentions. Further, it is submitted that in view of what has been argued by him and the contentions in written submission,

rejoinder filed by the applicants it is urged that the impugned decision is arbitrary, illegal and same has caused great hardship to the applicants who are already retired from service.

**9.** Per contra the respondents have contested the case of applicants. The learned standing counsel for respondents Shri H D Shukla mainly submitted that detailed reply filed in identical OAs including OA 133/2017 wherein all the relevant clarifications issued from time to time by the DoPT and CBEC as also other documents are produced as Annexures and to avoid repetition, he submitted that the said reply as also the written submissions filed by the respondents be considered as their reply in all the identical cases including the present OA. Accordingly he argued as under:-

**9.1** It has been contended that under the provisions of the erstwhile ACP scheme of 1999, Financial Up-gradations were granted in the then existing promotional hierarchy, which gave rise to uneven benefit to employees falling in the same pay scale as several organizations adopted different hierarchal pattern. Consequently, employees working in organization having greater number of intermediate grades suffered because Financial Up-gradations under ACPS placed them in lower pay scale vis-à-vis similarly placed employee in other organizations that had lesser intermediary grades. Subsequently, the ACP Scheme was replaced by Modified ACP (MACP) scheme by the DoPT vide OM dated 19.05.2009 which provided for three up-gradations after 10, 20 & 30 years respectively in the successive grade pay scale in the hierarchy of recommended revised pay band and grade pay as prescribed in the CCS (RP) Rules and not in the promotional hierarchy as was available in the ACP scheme.

**9.2** It is submitted that the applicants who are/were working as Superintendents in the grade pay of Rs.4800, were granted Non Functional Grade (NFG) Pay in GP of Rs.5400 in PB-2 after 4 years of their regular service. Thereafter, on their promotion to the grade of Assistant Commissioners, they have been placed in GP of Rs.5400 in PB-3.

It is submitted that the applicants herein are now claiming MACP benefits by ignoring Non-Functional Grade granted to them in fact they are basically claiming Financial Up-gradations under MACP in the promotional hierarchy which is against the MACP Scheme.

**9.3** Denying the claim of the applicants, the respondents have relied on Para 8.1 of Annexure-I of the MACP scheme, which provides that the grade pay of Rs. 5400/- in PB-2 and Grade Pay of Rs.5400/- in PB-3 shall be treated as separate grade pays for the purpose of grant of up-gradations under MACP schemes.

**9.4** It has been further submitted that after acceptance of the recommendation of 7th Central Pay Commission, the Central Civil Service (Revised Pay) Rules, 2016 was issued. As per the said recommendation, both the grades have been placed in different pay levels. GP of Rs.5400 PB-2 has been placed in Pay Leval-9 with initial pay of Rs.53,100/- and GP of Rs.5400/- in PB-3 has been placed in Pay Level-10 with initial pay of Rs.56,100/-. Therefore, in terms of scheme of MACP, the applicants have already received benefit of two separate grade pays during their service. Hence, the applicants are not entitled or eligible to claim 3rd MACP.

**9.5** It is submitted on behalf of the respondent CBEC that due to administrative error by field offices, the benefit of 3rd MACP wrongly granted to the applicants needs to be withdrawn as the same is not in accordance with the MACP Scheme. Accordingly, vide CBEC's clarification dated 20.06.2016 Commissionerates have withdrawn the GP of Rs.6600/- (i.e. 3rd MACP) which was erroneously granted to Superintendents including the applicants.

**9.6** It is contended by the respondents that on a reference from the office of Chief Controller of Accounts, CBEC, the DOPT vide their clarification **dated 26.07.2010 Annexure R/4,** had clarified that the benefit of Non-Functional Up-gradation granted to the Superintendents (Group B) officers on completion of 4 years of service would be treated/viewed as

up-gradation in terms of para 8.1 of the Annexure to OM dated 19.05.2009 and the same would be offset against one Financial Up-gradations under MACP Scheme. The learned counsel further submits that to make the issue more clear and uniform, the DoPT published a comprehensive FAQ on MACP Scheme on its website on **1.4.2011 Annexure R/5 where in at FAQ no. 16 it was clarified that Non-functional up-gradation would be viewed as one financial up-gradation for the purpose of MACPS in terms of para 8.1 of MACP dated 19.5.2009.**

**9.7** It is further submitted that when it was observed that in some of the Commissionerates, grade of Rs.6600/- is being allowed under MACPS to the Superintendents without taking into account the Non- Functional Up-gradation granted after 4 years of service, it was again clarified vide Board's letter dated 04.06.2014 (Annexure R/7) that Non Functional Up-gradation granted to Superintendents would be counted/offset against the financial up-gradation MACP scheme. On the basis of this clarification dated 04.06.2014, many Commissionerates took appropriate corrective action.

**9.8** It is further submitted, pursuant to the directions issued by the Hon'ble High Court of Madras, the case of Shri R Chandrasekaran was referred to DOPT for taking appropriate action. Initially, DOPT vide letter dated 06.05.2015, Annexure R/9 opined that since Shri R Chandrasekaran got only one promotion and 2nd ACP in grade pay of Rs.5400/- in his service career prior to implementation of MACP schemes w.e.f. 01.09.2008, he is entitled to the grant of 3rd MACP in the grade pay of Rs.6600/- under MACP with effect from 04.06.2012 on completion of 30 years of services. Subsequently, the DOPT, re-examined the issue and clarified that the grant of Non-functional grade pay of Rs.5400/- in PB-2 to the Superintendents need to be counted as one Financial Up-gradation for the purpose of MACP scheme.

**9.9** The learned counsel further submits that the Hon'ble Supreme Court in case of Union of India & Others Vs. M.V.Mohanan Nair vide judgment

dated 05.03.2020 in Civil Appeal No.2016 of 2020 (Annexure R-16), has set aside all the impugned orders of the High Courts and allowed the appeals preferred by the Union of India and upheld the government policy that benefit under MACP Scheme ought to be granted in the standard hierarchy of grade pays/pay levels and not in the promotion hierarchy. The Apex Court has also held that the ACP scheme which is now superseded by the MACP Scheme is a matter of government policy. Interference with the recommendation of an expert body like the pay commission and its recommendation for the MACP would have serious impact on the public exchequer.

It is further held in the said judgment that the recommendations of the pay commission of the MACP Scheme have been accepted by the government and implemented, and there is nothing to show that the scheme is arbitrary, or unjust warranting interference. In the judgment it has also been stated that without considering the advantages in the MACP scheme, the High Court erred in interfering with the government policy by simply placing reliance upon the Rajpal case. The Hon'ble Apex Court held that Rajpal case cannot be treated as precedent.

Therefore, the learned standing counsel submitted that the orders/judgment based on Rajpal's case, i.e., S Balakrishnan case is not applicable to the present case.

Further it is submitted that the order passed in case of R Chandrasekaran cannot be termed as *order in rem*. As such the respondents have withdrawn the grant of benefit of 3rd MACP in the case of said R Chandrasekaran and aggrieved by it, he has filed another OA before CAT, Chennai Bench wherein no relief has been granted till date.

**9.10** The respondents have filed their written submissions highlighting therein the clarifications issued by the DoPT from time to time on the subject and discussing the authorities relied upon by them and distinguishing the authorities relied on by the applicants. In this regard the learned standing counsel relied upon the contention stated in para-

19 of the said written submission mainly stating that as per various clarification issued by the competent authority i.e. DoPT and the provision of para 8.1 of Annexure A/1 to MACP Scheme, the Non-functional financial up-gradation in PB-2 GP Rs.5400/- granted to the Superintendents, Group B (applicants herein), on completion of four years of regular service shall be treated as separate grade pay and same is required to be set off against one financial up-gradation under MACP.

**9.11** It is also stated that after considering various directions issued by different Bench of this Tribunal as also Hon'ble High Courts, including the order passed by CAT Principal Bench in OA 2806/2016 dated 26.02.2020 in the case of All India Association of Central Excise Gazetted Executive Officer, Delhi & Ors v/s Union of India & Ors, as also the order passed in the case of Hari Ram & Anr v/s Registrar General, Delhi High Court etc, the CBEC sought further clarifications/opinions from the competent authority i.e. DoPT. In response to it, DoPT vide its instructions/clarification dated 12.01.2021 reiterated earlier position that NFU granted in GP 5400/- in PB-2 needs to be offset against one Financial Up-gradations as per MACP policy. Further, the DoPT clarified that the judgment/orders are not in consistent with the MACP Scheme, requires to be challenged in higher court.

It is further contended that on receipt of DoPT's clarification dated 12.01.2021, the respondents have filed necessary review applications and writ petition in respective OAs/Writ Petitions before the appropriate Tribunal and High Court. Therefore, learned counsel for the respondents submitted that the orders and judgments relied upon by the applicant are not helpful to them since same are in consistent with the MACP policy and on filing of review and writ petition thereto, same are now *sub judice* before the various courts. The impugned decision dated 20.06.2016 is in consonance with the mandate of MACP policy. The applicant is not entitled for any reliefs as sought in this OA.

**9.12** The learned standing counsel Shri H D Shukla placed reliance on the

following orders passed by various Benches of the Tribunal where in the claim of similarly placed officers for grant of 3rd MACP in the GP of Rs.6600/- has been dismissed and the clarification issued by the respondents dated 20.06.2016 upheld.

(i) Dileep Kumar v/s Union of India decided by CAT, Ernakulam Bench dated 12.04.2019 in OA No.916 of 2016 circulated vide letter dated 09.10.2019 (Ann. R/14 of written submission),

(ii) Order passed by CAT, Mumbai Bench in case of V. Paranesh, Asst. Director (retd), National Academy of Customs, Excise & Narcotics (NACEN), Mumbai v/s Union of India decided on 21.11.2019 in OA No.186/2017, circulated by the Board vide letter dated 19.02.2020, (Ann. R/15 of written submission).

(iii)Common order dated 21.11.2019 passed by the CAT, Mumbai Bench in OA 44/2017 in the case of V U Shah v/s Union of India alongwith other cognate OAs.

**9.13** In sum, the standing counsel for the respondents submits that the judgment passed by Hon'ble Apex Court in the case of M V Mohanan Nair has answered all the questions raised in this OA and squarely applies to the facts of the present case. The Applicants are not entitled for grant of MACP with Grade Pay of Rs.6600/- in view of the instructions/judgments cited above. It is prayed that the OA be dismissed.

**10**. Heard Shri Joy Mathew, learned counsel for applicant and Shri H D Shukla, learned standing counsel for the respondents. On going through the prayer sought in this OA, submission of learned counsel for parties and the directions contained in common order dated 09.03.2020 passed in R/SCA 5868/2020 and other connected SCAs by Hon'ble High Court of Gujarat, the short question that arises for consideration before us is:

***(i) Whether the respondents have rightly followed the provision of para 8.1 of Annexure A/1 to Modified Assured Career Progression Scheme (MACPS) in treating the Non Functional Grade Pay of Rs.5400/- in PB-2 granted to the applicants as a separate grade pay and set off against MACP benefit;***

***(ii) Whether the withdrawal of the benefit of 3rd MACP in PB-3 GP Rs.6600/ vide impugned order dated 20.06.2016 by the respondents is in accordance with the terms and conditions of MACP Scheme?***

**10.1** It is noticed that the applicants are retired employees of various Commissionerates of CGST Ahmedabad/Vadodara Zones. The applicants have retired from the post of Assistant Commissioner (Group – A).

**10.2** It is noticed that the Government has considered the recommendation of the 6th Central Pay Commission for introduction of Modified Assured Career Progression Scheme (MACPS) and had accepted the same with further modification to grant three Financial Up-gradations under the MACPs in the standard hierarchy of Grade Pay / Pay Levels instead of promotional hierarchy in supersession of earlier ACP Scheme. Accordingly, the DoPT had issued O.M. dated 19th May, 2009 which is known as MACP Scheme. The Clause 9 of the said Scheme reads as under:

> **"9. Any interpretation/clarification of doubt as to the scope and meaning of the provisions of the MACP Scheme shall be given by the Department of Personnel and Training (Establishment-D). The Scheme would be operational w.e.f. 01.09.2008. In other words, Financial Up-gradations as per the provisions of the earlier ACP Scheme (of August, 1999) would be granted till 31.8.2008."**

From the aforesaid Clause 9 of the said Scheme, it can be seen that the DoPT (Establishment-D) is the competent authority for interpretation of any part of the Scheme and clarification of any doubt as to the scope and meaning of the MACP Scheme.

**10.3** Further, it is noticed that the details of the MACP Scheme and conditions for grant of the financial up-gradation under the Scheme are given in Annexure-I of the said OM dated 19th May, 2009. The Para 8 and 8.1 of Annexure-I to the MACP Scheme reads as under:

> ***"8. Promotions earned in the post carrying same grade pay in the promotional hierarchy as per Recruitment Rules shall be counted for the purpose of MACPs.***
>
> ***8.1 Consequent upon the implementation of Sixth CPC's recommendations, grade pay of Rs. 5400 is now in two pay-bands viz., PB-2 and PB-3. The grade pay of Rs. 5400 in PB-2 and Rs. 5400 in PB-3 shall be treated as separate grade pays for the***

***purpose of grant of up-gradations under MACP Scheme"***

**11** In the present case, it emerges from the record that after introduction of MACPs, the Department of Revenue, Central Board of Excise and Customs on 16.9.2009 with the approval of the Department of Expenditure issued clarification on grant of Grade Pay of Rs.5400/- in PB-2 on Non-functional basis to Group 'B' Officers of CBEC including Superintendent of Customs after four years of regular service in the Grade Pay of Rs. 4800/- in PB-2 to the effect that the higher Grade Pay of Rs.5400/- in PB-2 on Non-functional basis is not linked to vacancy and may be given with retrospective w.e.f. , i.e., 01.01.2006 provided the officer concerned has (i) completed minimum four years of regular service as on 01.01.2006 as Custom Appraiser/ Superintendent of Central Excise / Superintendent of Customs (P) irrespective of the pay scale attached to the post, and (ii) is clear from vigilance angle.

Accordingly, the applicants herein who had completed four years of regular service as Superintendent, they were granted Grade Pay of Rs. 5400/- in PB-2 on Non-functional basis under the MACPS. Evidently, the applicants were granted financial up-gradation by way of Non-Functional Grade of Rs.5400/- in PB-2 w.e.f. 01.01.2006 as per the terms of MACP Scheme and were accordingly placed in respective Grade Pay .

Here, it is apt to mention that the terms and conditions with regard to the pay of the applicants are governed under Central Civil Services (Revised Pay) Rules, 2008, Further, Rule – 3 of these Rules provides definitions. According to the Rule – 3 (4) "present scale" in relation to any post/grade specified in column 2 of the First Schedule means the scale of pay specified against that post in column 3 thereof. Rule – 3 (5) defines that "pay in the pay band" means pay drawn in the running pay bands specified in column 5 of the First Schedule and Rule 3(6) stipulates that **"grade pay" is the fixed amount corresponding to the pre-revised pay scales/posts.**

The First Schedule – Part A, Section – I of the said Rules indicates the revised pay bands and grade pay; the relevant revised pay band and corresponding grade pay are extracted below for ready reference :-

| Present Scale | | | Revised Pay Structure | | |
|---|---|---|---|---|---|
| **Sr. No.** | **Post /Grade** | **Present Scale** | **Name of Pay band/Scale** | **Corresponding Pay Bands/ Scales** | **Corresponding Grade Pay** |
| (1) | (2) | (3) | (4) | (5) | (6) |
| **14** | **S-13** | **7450-225-11500** | **PB-2** | **9300-34800** | **4600 (Inspector)** |
| **15** | **S-14** | **7500-250-12000** | **PB-2** | **9300-34800** | **4800 (Superintendent)** |
| **16** | **S-15** | **8000-275-13500** | **PB-2** | **9300-34800** | **5400 (NFG given after four years)** |
| **17** | **New Scale** | **8000-275-13500 (Group A Entry)** | **PB-3** | **15600-39100** | **5400 (on completion of 24 years of service)** |
| 18 | S-16 | 9000 | PB-3 | 15600-39100 | 5400* |
| 19 | S-17 | 9000-275-9550 | PB-3 | 15600-39100 | 5400* |
| **20** | **S-18** | **10325-325-10975** | **PB-3** | **15600-39100** | **6600 (Claimed as 3rd MACP)** |

*Not applicable in the case of CBEC.

**12** It is an admitted fact that the applicants joined as Inspector of Central Excise between 01.01.1982 and 31.08.1984. Thereafter, they were promoted to the post of Superintendent in the year 1996/97-2002 ( in the pay scale of Rs. 7500 – 250 - 12000 in the 5th CPC scale & the corresponding scale in 6th CPC is PB– 2, Pay Scale 9300 – 34800 with the Grade Pay 4800).

On introduction of 6th CPC and as per order / clarification issued by Department of Revenue CBEC dated 16.09.2009 **all the applicants on rendering 4 years of regular service as Superintendents were granted the benefit of Non-Functional Grade in PB-2 GP 5400/- Pay Scale 9300-34800 w.e.f. 01.01.2006 (respective dates are stated herein below).**

**At that relevant time, ACP Scheme of financial up-gradation was in vogue. In accordance with the ACPS, in the year 2006, the applicants were also granted 2nd ACP of Pay Scale 15600 – 39100 in PB-3 with GP 5400/-, on completion of 24 years of service. It may be mentioned here that the PB-3 with Grade Pay 5400/- is a new scale at the Entry Grade for "Group – A service" as mentioned in the first Schedule (Part-A, Section-1, Serial No.17)**

Further, it is seen that on completion of 30 years of services, the applicants were also granted benefits of 3rd MACP in PB-3 GP 6600/- in the

year 2012 and thereafter in the year 2014-2016, they were promoted as Assistant Commissioners.

**13** Since the benefits of grant of the 3rd MACP in GP 6600/- to the applicants was not in consonance with the MACP Scheme, the respondent had decided to withdraw the same and initiated the recovery of the excess payment.

**14** The following details indicate the service particulars of the applicants which includes grant of various Financial Up-gradations, Non Functional Grade and promotions to them, as also details of withdrawal of benefit of 3rd MACP and recovery thereon which reads as under:-

| **DETAILS OF OFFICERS WITH REGARD TO OA NO.247 OF 2017** | | | |
|---|---|---|---|
| **App. No.** | 1 | 2 | 3 |
| **FULL Name of the Oficer with Date of Birth** | **BAJRANGLAL KISHORLAL MEENA** | **Surjibhai Nanjibhai Menat** | **Ramsahai Dhanphool Meena** |
| **Whether working / retired** | RETIRED | RETIRED FROM CGST GANDHINAGAR | Retired from CGST Ahmedabad North (31.07.2017) |
| **Recruited / Joined as,** | INSPECTOR | INSPECTOR | INSPECTOR |
| **Date of Joining** | 15.03.1982 | 16.03.1982 | 14.07.1982 |
| **Promotion, (1st Financial Up-gradation under Pre-6th CPC ACP Scheme)** | …. | ….. | ……. |
| **Date of Promotion as Superintendent** | 20.11.1997 | 15.03.1996 | 04.01.1995 |
| **Date of grant of NFG PB-2, GP 5400/- (Introduced by 6th CPC)** | 01.01.2006 | 01.01.2006 | 01.01.2006 |
| **Date of Grant of PB-3, GP 5400/-** | 15.03.2006 | 16.03.2006 | 14.07.2006 |
| **Whether PB-3, GP6600/- WAS GRANTED (with date) Subsequently granted promotion to the post of Assistant Commissioner** | 15.03.2012<br><br>2014-2016 | 16.03.2012<br><br>2014-2016 | 14.07.2012<br><br>2014-2016 |
| **IF GP 6600/- GRANTED THEN Recovery done OR NOT** | Recovered | YES | yes |
| **Remark** | | | Recovery Amount of Rs. 407624/- during the period from 14.07.2006 to 31.07.2017 towards excess payment in salary |

**14.1** At this stage, it is also appropriate to take note that on a reference from the office of the Chief Controller of Accounts, CEBC whether the grant of grade pay of Rs. 5400/- in PB-2 alongwith the benefit of one increment @ 3% may be treated as ACP. In response to it the DoPT vide their communication dated 21.7.2010/26.07.2010 (Annexure R-4) had clarified that:

> "***the benefit of non-functional upgrading granted to the Superintendents (Group B) Officers on completion of years of service would be treated/viewed as up-gradation in terms of para 8.1 of OM dated 19.5.2009 and the same would be off set against one Financial Up-gradations under the MACP Scheme*".**

**14.2** It is further noticed that the DoPT published a comprehensive FAQ on MACP Scheme on 1.4.2011 wherein at FAQ No. 16, the DoPT clarified as under,

| Sr.No. | Question | Answer |
|---|---|---|
| **16** | **Whether "non-functional scale of Rs. 8000-13500 ( revised to grade pay of Rs. 5400 in PB-3) would be reviewed as one Financial Up-gradations for the purpose of MACPS ?** | **Yes, in terms of pr 8.1 of Annexure-I of MACPs dated 19.5.2009.** |

**14.3.** Thereafter, on 20.05.2011 the CBEC issued a letter to the Chief Commission/DGs under CBEC had taken note of the fact that NFG of Rs.5400/- in PB-2 granted between 01.01.2006 and 31.08.2008, the same is not counted under ACP. However, in terms of para 8.1 of Annexure of MACPS, financial up-gradation granted in the grade pay of Rs.5400/- in PB-2 and PB-3 would be counted separate up-gradation and would be offset against the financial up-gradation under the scheme. This contention has further been reiterated in the communication of CBEC of even No. dated 04.06.2014.

**14.4** Thus, the competent authority under the MACP Scheme i.e. DoPT (Establishment–D) as also the CBEC has clarified in no uncertain terms that the benefit of Non-functional Grade granted to the Superintendent (Group-'B') officers, after completion of 4 years would be treated/viewed as up-gradation in terms of para 8.1 of Annexure-I of OM dated 19.5.2009 and the same would be off set against one financial up-gradation under MACPS and further that the grade pay of Rs. 5400 in PB-2 and Rs. 5400 in PB-3 shall be treated as separate grade pay for the purpose of grant of up-gradations under MACP Scheme. In view of this, the submission of the applicant that an exception be made for those who got their 2nd ACP between 01.01.2006 and 31.08.2008, is not tenable.

**14.5** It is noticed that *in spite* of aforesaid clarification issued by the competent authority, the various Commissionerate offices of Central Excise, Customs and Service Tax ignored the mandate under condition No.8.1 of the Annexure –I to MACP Scheme and extended the 3rd MACP in Grade Pay of Rs.6600/- in PB-3 to the

Superintendent which was subsequently withdrawn by the respondents CBEC as per instruction/ clarification issued by the DoPT. However, grant of 3rd MACP and its subsequent withdrawal, resulted in various litigations. In this regard, it suffices to refer the observation of the Hon'ble High Court of Madras passed in the case of R.Chandrashekaran v/s. Union of India & Ors., W.P No.19024/2014 decided on 08.12.2014 which reads as under:

> ***"15. ……It is a matter of record that different departments have interpreted the clarification in different manner and the same resultant in unfortunate situation.***
>
> ***16. The Customs and Central Excise Department has granted benefits of MACP to the employees like petitioner herein without taking into account the Financial Up-gradations given on 'Non-functional scale'. The departments have earlier maintained that only functional promotions would be counted for the purpose of extending the benefits of the ACPS. The employees were given all benefits by taking a position that there was no provision for counting 'Non-functional scale' for the purpose of the ACPS. Subsequently, on the basis of the further clarification the benefits were all withdrawn. This resulted in filing several Original Applications before the Central Administrative Tribunal. The Central Administrative Tribunal, Chandigarh Bench rejected the contentions taken by the respondents in OA No.1038/2010. The said decision was upheld by the Hon'ble High Court of Punjab & Haryana. Even thereafter, several orders were passed by the respondents. We have considered similar writ petitions. In case the concerned departments took earnest efforts to codify all these circulars issued earlier and to issue a fresh circular explaining the nature and scope of MACPS and as to whether Non-functional scale would be counted for the purpose of ACPS, it would be possible to award cases like this and future cases that are bound to come. We are therefore of the view that instead of deciding the matter one way or the other it would be in the interest of all the parties to direct the Department of Personnel, Public Grievances and Pensions, to look into the issue and to take a decision in the light of MACP Scheme."***

**14.6** As noted hereinabove, after the aforesaid directions issued by Hon'ble High Court of Madras in R.Chandrashekaran case, initially the respondents vide their letter dated 26.5.2015 directed the Commissionerate of Central Excise Chennai to grant the 3rd Financial Up-gradations in the Grade Pay of Rs.6600/- to said Shri R.Chandrashekaran. Subsequently, as per the DoPT's clarification, the said letter dated 26.5.2015 was withdrawn and it was further clarified that the grant of Non-functional Grade Pay of Rs.5400/- in PB-2 to the Superintendent needs to be counted as one Financial

Up-gradations for the purpose of MACP Scheme by the Government vide order dated 20.6.2016 (which is impugned herein).

For ready reference, the said impugned order/letter 20.06.2016 is reproduced as under:-

*"F.No.A-23011/25/2015-Ad.IIA*
*Government of India*
*Ministry of Finance*
*Department of Revenue,*
*Central Board of Excise and Customs*
*xxxxxxxxxxx*

*North Block*
*New Delhi, the **20th June, 2016***

*To,*

*All the Cadre controlling Authorities under CBEC*

*Subject: Clarification on MACP – Grant of 3rd MACP to the Superintendent in CBEC who were granted non-functional grade pay of Rs.5400/- in Pay Band – 2 – Reg.*

*Sir/Madam,*

*I am directed to say that the Board is in receipt of various references/representations from the field offices/officers seeking clarifications on the issue of grant of 3rd Financial Up-gradations under MACP Scheme to Superintendents who were granted non-functional grade pay of Rs.5400/- in Pay Band-2.*

*2 The matter regarding counting of non-functional Grade pay of Rs.5400/- in Pay Band -2 to the Superintendents as one Financial Up-gradations for the purpose of MACP Scheme has been re-examined in consultation with Department of Personnel & Training (DOPT). DOPT has now advised in consultation with Department of Expenditure **that the grant of non-functional grade pay of Rs.5400/- in PB-2 to the Superintendent needs to be counted as one Financial Up-gradations for the purpose of MACP Scheme**. DOPT has drawn attention to the specific provision in Para 8.1 of Annexure-I of OM No.35034/3/2008-Estt.(D) dated 19th May, 2009 read with FAQ No.16 (copy enclosed) which indicate that the Non-functional scale in Grade Pay of Rs.5400/- in PB-2 is to be treated as a Financial Up-gradations under MACP Scheme. DOPT has also advised that court cases including the case of R Chandrasekaran may be agitated/defended as per the MACP Scheme vide DOPT O.M. dated 19.5.2009.*

*3 **The Board's letter of even number dated 26.05.2015 addressed to Chief Commissioner of Central Excise, Chennai Zone in the case of Shri R Chandrasekaran has been treated as withdrawn**.*

*4 All Cadre controlling Authorities are requested to take appropriate action to settle MACP cases accordingly. Also, appropriate action may be taken to defend the cases, emerging out of the case of Shri R Chandrasekaran, on behalf of Union of India.*

*This issues with the approval of Chairman, CBEC.*

*Yours faithfully,*
*(A K Quasin)*
*Deputy Secretary to*
*Government of India."*

**14.7** It is noticed that pursuant to aforesaid decision dated 20.06.2016, the respondents have withdrawn the grant of benefit of 3rd MACP in case of R Chandrasekaran and also implemented the said decision

by taking action in the case of applicants who are similarly placed and the benefit of 3rd MACP granted to them were also withdrawn by way of recovery. The core ground advanced by the respondents to do so is the mandate of para 8.1 of MACP policy, which stipulates that any financial up-gradation needs to be considered as one separate financial up-gradation under the MACP.

**14.8** At this stage, it is appropriate to refer the recent dictum of Hon'ble Apex Court in the case of Union of India V/s. M.V.Mohanan Nair reported in (2020) 5 SCC 421(for brevity referred as 'M.V.Mohanan case'), wherein Hon'ble Apex Court has considered batch of appeals filed by Union of India assailing different orders / judgments passed by the various Hon'ble High Courts dismissing petitions filed by Union of India thereby upholding decisions rendered by different Benches of the Central Administrative Tribunal granting Financial Up-gradations of Grade Pay in the next promotional hierarchy by placing reliance upon the judgment passed by Hon'ble High Court of Punjab & Haryana in the case of Union of India v/s. Rajpal. The Hon'ble Apex Court considered the question whether the MACPS entitles financial up-gradation to the next Grade Pay or to the Grade Pay of the next promotional hierarchy.

It is noticed that while setting aside the orders of the respective High Courts in the said. M. V. Mohanan Nair case (supra) the Hon'ble Apex Court by upholding the Government Policy, has held that '**benefit under MACP Scheme are to be granted in the standard hierarchy of Grade Pays/Pay Levels and not in the promotional hierarchy'**. Further, in para 56 of the said judgment, the Hon'ble Apex Court held as under :

> ***'56. The ACP Scheme which is now superseded by MACP Scheme is a matter of government policy. Interference with the recommendations of an expert body like the Pay Commission and its recommendations for the MACP Scheme, would have a serious impact on the public exchequer. The recommendations of the Pay Commission of the MACP Scheme have been accepted by the Government and implemented. There is nothing to show that the Scheme is arbitrary or unjust warranting interference. Without considering the advantages in the MACP Scheme, the High Court's erred in interfering with the Government's Policy in***

***accepting the recommendation of the 6th Central Pay Commission by simply placing reliance upon the Rajpal's case (Union of India v/s. Rajpal). The impugned orders cannot be sustained and are liable to be set aside.'***

**14.9** In the present case, the respondents have followed the condition stipulated in para 8.1 of Annexure A/1 to MACP Scheme, which is policy of the government and the competent authority i.e. DoPT has repeatedly issued clarifications to treat the Non Functional Grade as separate Grade Pay for the purpose of grant of benefit under MACP. The Hon'ble Apex Court categorically held in M V Mohanan Nair (supra) that the said MACP Scheme cannot be interfered with since there is no infirmity in the scheme. Under the circumstances, the said observation of the Hon'ble Apex Court is squarely applicable in the present case.

It is also apt to mention that the Hon'ble High Court of Gujarat while remanding the present OA also observed that in light of law laid down in M.V. Mohanan Nair Case nothing much left for this Tribunal to adjudicate the issue raised by the applicant. In view of the said observation, in our considered view the submission of the counsel for the applicant that said judgment i.e. M V Mohanan Nair is not applicable in the present case is not tenable and same is rejected.

**14.10** It is the specific case of the applicants that in 2012, similarly placed official working at Chennai namely one Mr. S.Balakrishnan approached the Madras (now Chennai) Bench of this Tribunal by filing OA No. 280/2012 seeking fixation of his pay under 3rd MACP in Grade Pay of Rs.6600/- on completion of 30 years of his services. The said OA was allowed in favour of Mr. S.Balakrishnan as per order dated 22.07.2013. Aggrieved by it, Union of India had preferred writ petition No.11535/2014 before the Hon'ble Madras High Court, and the said writ petition was dismissed vide order dated 16.10.2014 with the concluding observation in para 18 of the said order, which reads as under :

> *"18.* ***The Central Admininstrative Tribunal correctly interprefe clause 8 and 8(1) of the MACPs and quashed the impugned orders and resorted the earlier orders granting benefit to the respondent 1 to 3. Similar view was taken by the Central Administrative Tribunal, Chandigarh Bench in OA No.1038 of 2010 and it was upheld by the Hon'ble High Court of Punjab and Haryana by its judgment dated 19.10.2011 in CWP No.19387 of 2011. We are therefore, the considered view that the impugned order does not called for interference by exercising the power of judicial review."***

It is further stated by the applicants that aggrieved by the aforesaid judgment, the SLP was preferred by Union of India and the Hon'ble Supreme Court vide its order dated 31.08.2015 dismissed the said SLP (c ) No.15396/2015 in limine.

It is also argued by the counsel for the applicants that the SLP filed against the judgment passed by the Hon'ble High Court of Punjab and Haryana by its judgment dated 19.10.2011 in CWP No.19387 of 2011 i.e., **case of Union of India versus Rajpal** was also dismissed in limine, and therefore, the decision of Chennai Bench of this Tribunal dated 22.07.2013 in OA No.280/2012 allowing the benefits of 3rd MACP up-gradation in PB -3, GP Rs.6600/- in S. Balakrishnan Case becomes final and attend finality, therefore it is completely binding upon the present respondents. Thus, the applicants herein who are identically and similarly placed as like S.Balakrishnan, they are also entitled for 3rd MACP in PB-3, GP Rs.6600/-.

**15** Now, in view of the pronouncement of the judgment by the Hon'ble Supreme Court in the case of **Union of India vs. M. V. Mohanan Nair reported in (2020) 5 SCC 421**, the aforesaid submission of the applicants falls flat. The Hon'ble Supreme Court in M. V. Mohannan (supra) in categorical terms held that the decision rendered in **Union of India vs. Rajpal case ought not to have been quoted as precedent having been dismissed on the ground that no sufficient cause was shown for the delay in re-filing**. The Hon'ble Supreme Court observed thus,

> ***"49. Observing that when a Special Leave Petition is dismissed by a non-speaking order, by such dismissal, the Supreme Court does not lay down any law as envisaged under Article 141 of the Constitution of India in Supreme Court Employees Welfare Association v. Union of India and Others (1989) 4 SCC 187, this Court held as under:-***

> ***22. It is now a well-settled principle of law that when a special leave petition is summarily dismissed under Article 136 of the Constitution, by such dismissal this Court does not lay down any law, as envisaged by Article 141 of the Constitution, as contended by the learned Attorney General. In Indian Oil Corporation Ltd. v. State of Bihar (1986) 4 SCC 146 it has been held by this Court that the dismissal of a special leave petition in limine by a non-speaking order does not justify any inference that, by necessary implication, the contentions raised in the special leave petition on the merits of the case have been rejected by the Supreme Court. It has been further held that the effect of a non-speaking order of dismissal of a special leave petition without anything more indicating the grounds or reasons of its dismissal must, by necessary implication, be taken to be that the Supreme Court had decided only that it was not a fit case where special leave petition should be granted. In Union of India v. All India Services Pensioners Association (1988) 2 SCC 580 this Court has given reasons for dismissing the special leave petition. When such reasons are given, the decision becomes one which attracts Article 141 of the Constitution which provides that the law declared by the Supreme Court shall be binding on all the courts within the territory of India. It, therefore, follows that when no reason is given, but a special leave petition is dismissed simplicitor, it cannot be said that there has been a declaration of law by this Court under Article 141 of the Constitution. [underlining added]***
>
> *50.* ***Raj Pals case having been dismissed on the ground that no sufficient cause was shown for the delay in re-filing Raj Pal case ought not to have been quoted as precedent of this Court by the High Court****."*

**15.1** Thus, the trite principle of law is that an order rejecting the Special Leave Petition at the threshold without giving detailed reasons does not constitute any declaration of law or a binding precedent. Therefore, the basic premise seeking the reliefs as prayed for in the present OA on the strength of the decision of the Hon'ble High Court of Madras in S Balakrishnan (supra), which decision was rendered relying on the decision of the judgment of the Hon'ble High Court of Punjab and Haryana in the case of Union of India vs. India Vs. Rajpal, cannot be said to be decision on merit. It is also pertinent to mention at this stage that the SLP preferred by the Union of India in the case of S.Balakrishnan bearing SLP No. 15396 of 2015 also came to be dismissed at the threshold. Therefore, it cannot be said the Hon'ble Apex Court approved the judgment passed by High Court of Madras since the SLP was dismissed inlimine. Moreover, undisputedly the order passed in OA filed by S.Balakrishnan was based on Rajpal (supra) case and as noted hereinabove the Hon'ble Apex Court

declared that judgment passed in Rajpal case cannot be treated as a precedent. Therefore, the judgment/order in the case of S.Balakrishnan (supra) cannot be treated as a precedent and thus does not help the applicants in any manner.

**15.2** Further, the case relied on in the case of and R. Chandrasekaran (supra) by the applicant also does not stand in favour of them. It is noticed that in the said case the applicant i.e. R Chandrasekaran, who was similarly placed employee to that of Shri S Balakrishnan approached the Madras Bench of this Tribunal by filling OA 675 of 2013 seeking the very same reliefs. The said OA came to be dismissed on 24.2.2014. Being aggrieved by the said dismissal, the said R. Chandrasekaran preferred Writ Petition in WP No. 19024 of 2014 before the Hon'ble High Court of Judicature at Madras. In the said Writ Petition, the Hon'ble High Court though set aside the order of the Madras Bench of the CAT, did not grant any relief to the applicants but sent the matter to the Department of Personal, Public Grievances and Pension for their fresh consideration. Pursuant to this remand, the government vide letter dated 26.5.2015 directed the Chief Commissioner to implement the order and to grant the third financial up-gradation in the grade pay of Rs. 5400/- to Shri R. Chandrasekaran. Subsequently, vide clarification dated 20.6.2016, (which is also impugned in the present OA) the CBEC in consultation with DoPT directed for withdrawal of the said benefit of grant of 3rd MACP in PB-3 GP Rs.6600/- to said Shri R Chandrasekaran.

At this stage, it is also apt to mention that aggrieved by said order of withdrawal dated 20.06.2016 Shri R Chandrasekaran has filed another OA No.1380/2016 before CAT, Chennai Bench which is pending as on date. Thus, the reliance placed by the applicants on the decision in R. Chandrasekaran also does not stand to benefit of any kind to the applicants herein.

**15.3** It is notice that during the pendency of M V Mohnan Nair Case before Hon'ble Apex Court & before the judgment passed in the said case, different orders / directions were issued by various Benches of this

Tribunal and Hon'ble High Courts and same has been relied upon by the counsel for applicant including (i) decision of the Principal Bench of the CAT in OA No.2806 of 2016 decided on 26.2.2020 (ii) Common Order passed in Misc. Petition No.6500/2019 in Union of India & Ors. v/s B.R.K. Lyer and Ors. and other connected petitions by Hon'ble High Court of Madhya Pradesh: Jabalpur Bench which was reserved on 19.02.2020 and pronounced on 30.04.2020 (iii) Order dated 04.03.2020 in OA No.162/2018 in the case of Mune Gowda v/s. UOI & Ors. (iv) Order dated 20.12.2017 passed by Hon'ble High Court of Delhi in W. P (C) No.9357/2016 in the case of Hariram and Anr as also other orders with respect to implementation of the condition No.8.1 of Annexure –I to MACP and consequent withdrawal of the 3rd MACP granted to the Superintendent working under CBEC. Therefore, the Department of Revenue, CBEC again vide letter dated 28.10.2020 has sought advice of the DoPT regarding counting of Non-functional up-gradation (NFU) granted to the Superintendents as one financial up-gradation under MACP Scheme clarification / instruction.

In response to the said queries, by taking into consideration the provision of para 8.1 of Annexure A/1 of MACP Scheme dated 19th May, 2009 including the various clarifications issued on the subject and the judgment passed by Hon'ble Apex Court in the case of Mohanan Nair as also different orders passed by various Benches of this Tribunal and various High Courts (referred above in this para), the DoPT, the competent authority in this case, has issued another clarification/ advise dated 24.12.2020, wherein it has reiterated its earlier position that NFG/NFU granted in GP 5400/- in PB -2 needs to be offset against one Financial Up-gradations as per MACP Scheme. The grant of Grade Pay of Rs.5400/- in PB-2, is very much in the ladder of hierarchy of Grade Pay. After 6th CPC and introduction of MACP Scheme, MACP is granted not in the hierarchy of the promotional posts but in the hierarchy of standard Grade Pay. Any deviation from these guidelines would have repercussions in all other

cadres of the Central Government and further stated that the earlier advice of DoPT dated 02.05.2016 and I.D Note dated 02.6.2016 still holds good and reiterated.

Further, it is clarified by the DoPT that direction issued in orders /judgments of various Tribunal and Hon'ble High Courts which are referred hereinabove are not consistent with the policy of the MACP Scheme, as also the said directions are contrary to the law laid down in the case of M V Mohanan Nair and therefore the same requires to be challenged in higher courts.

**15.4** The respondents CBEC categorically contended in their reply/written submissions that on receipt of aforesaid advice/clarification of DoPT, they have filed their review applications before the concerned Tribunals/Courts against the orders/judgments referred hereinabove. In other words, the respondents have filed review applications against the orders / judgments referred and relied by the applicants as the said orders / judgments are not in consonance with the mandate of MACPS and the law laid down by Hon'ble Apex Court in the case of M V Mohanan Nair (Supra). Therefore, the judgments relied upon by the counsel for the applicants are not applicable. At the cost of repetition, we reiterate that most of the orders/judgments relied upon by the applicant has followed the order passed in S. Balakrishnan (supra) which was based on judgment passed in Rajpal case and as noted hereinabove in the case of Union of India v/s M V Mohanan Nair (supra) it has been held that the "Rajpal case" ought not to have been quoted as precedent. Therefore, also the said orders/judgments are of no help to the applicant.

**15.5** At this stage it is appropriate to mention that it is settled principles of law that the court should avoid giving a declaration granting a particular scale of pay and compelling the Government to implement the same. The prescription of Pay Scales and incentives are matters where decision is taken by the Government based upon the recommendation of the expert bodies like Pay Commission and several relevant factors including financial implication and court

cannot substitute its views. As held in State of Haryana Vs. Haryana Civil Secretariat Personal Staff Association (2002) 6 SCC 72, the court should approach such matters with restraint and interfere only when the court is satisfied that the decision of the Government is arbitrary. It is also settled law that 'when the Government has accepted the recommendation of the Pay Commission and has also implemented those, any interference by the Court would have serious impact on the public exchequer'.

**In this regard, we may also profitably refer to the observation of Hon'ble Apex Court in para 33 and 34 of M.V.Mohanan Nair (supra) which reads as under :**

***"33. Observing that it is the functioning that which normally acts under the recommendations of the Pay Commission which is proper authority to decide upon the issue, in Union of India and another v. P.V. Hariharan and another (1997) 3 SCC 568, it was held as under :***

> **"5. It is the function of the Government which normally acts on the recommendations of a Pay Commission. Change of pay scale of a category has a cascading effect. Several other categories similarly situated, as well as those situated above and below, put forward their claims on the basis of such change. The Tribunal should realise that interfering with the prescribed pay scales is a serious matter. The Pay Commission, which goes into the problem at great depth and happens to have a full picture before it, is the proper authority to decide upon this issue. Very often, the doctrine of equal pay for equal work is also being misunderstood and misapplied, freely revising and enhancing the pay scales across the board. We hope and trust that the Tribunals will exercise due restraint in the matter. Unless a clear case of hostile discrimination is made out, there would be no justification for interfering with the fixation of pay scales. We have come across orders passed by Single Members and that too quite often Administrative Members, allowing such claims. These orders have a serious impact on the public exchequer too. It would be in the fitness of things if all matters relating to pay scales, i.e., matters asking for a higher pay scale or an enhanced pay scale, as the case may be, on one or the other ground, are heard by a Bench comprising at least one Judicial Member."**

***34. Observing that the decision of expert bodies like the Pay Commission is not ordinarily subject to judicial review, in State of U.P. and Others v. U.P. Sales Tax Officers Grade II Association (2003) 6 SCC 250, the Supreme Court held as under:-***

> **"11. There can be no denial of the legal position that decision of expert bodies like the Pay Commission is not ordinarily subject to judicial review obviously because pay fixation is an exercise requiring going into various aspects of the posts held in various services and nature of the duties of the employees...."**

**16.** It can be seen that as per the stipulation in Clause – 9 of the MACPS dated 19.05.2009 the DoPT (Establishment – D) is the competent authority with respect to interpretation / clarification of doubt as to the scope and meaning of the provisions of MACP Scheme and in the present case, undisputedly the said competent authority categorically instructed the CBEC to treat the NFG / NFU granted to the Superintendent as one separate financial up-gradation under MACP. The unambiguous stipulation under the MACP Scheme and consistent clarifications issued by DoPT as noted hereinabove makes it clear beyond doubt that the financial up-gradation to the applicants under NFG / NFU is to be counted as one financial up-gradation under MACP.

Since, applicants herein were promoted from the post of Inspector to the post of Superintendent in PB – 2 GP 4800 and thereafter on completion of 4 year of regular service as Superintendent they were granted financial up-gradation as NFG in PB – 2 GP 5400 w.e.f. 01.01.2006 / 24.09.2006 vide order dated 16.09.2009, subsequently on completion of 24 years of service the applicants were granted 2$^{nd}$ financial up-gradation under ACP w.e.f. June, 2008 in PB – 3 Rs. 15600 – 39100 with GP 5400 and thereafter they were also granted another financial up-gradation of 3$^{rd}$ MACP in GP 6600/- by ignoring grant of Financial Up-gradation as Non- Functional Grade PB – 2 GP 5400/-. In view of this factual matrix, in our considered view, the respondents have correctly treated the NFG / NFU in PB – 2 Rs. 5400 granted to the applicant as separate Grade Pay in terms of mandate of para 8.1 of Annexure A/1 of MACPS and rightly decided to withdraw the erroneous grant of further financial up-gradation by way of 3$^{rd}$ MACP in PB – 3 GP Rs. 6600/- for which applicants were not at all entitled. Therefore, the submission of the applicants that the NFG granted to them cannot be treated as up-gradation in MACP is not tenable and same submission is found to be contrary to the mandate of MACPS itself. The impugned decision dated 20.06.2016, is found to be issued in consonance with the

terms of para 8.1 of Annexure A/1 to MACPS and for the said reason it cannot be said that the impugned order is suffering from any infirmities. Needless to reiterate that the two questions posed above are answered accordingly.

16 In view of what has been observed and decided by the Hon'ble Apex Court in **Union of India vs. M. V. Mohanan Nair (supra) more particularly it has been held that "*there is nothing to show that the scheme (i.e. MACP) is arbitrary or unjust warranting interference as also when the government has accepted the recommendation of pay commission and has also implemented those, any interference by the court would have a serious impact on the public exchequer"***, in the present case, as noted hereinabove since the applicants were not entitled for grant of 3rd MACP of Grade Pay Rs.6600/- in PB-3 and the respondents have correctly decided to withdraw the said benefit which was granted erroneously to the applicants, and accordingly the excess payments have already been recovered by the respondent before the retirement of some of the applicants and therefore we are not inclined to interfere with the said recovery. The separate OAs filed by some of the applicants against the decision of respondent to recover excess payment paid to such applicants towards 3rd MACP, the said OAs are being disposed of by separate order.

18 At this stage, it is apt to mention that the present applicants and some other similarly placed officials of the same department had filed identical OAs before this Tribunal in the year 2016/17, out of which in OA 581/2016 (i.e. the present one), this Tribunal vide its interim order dated 12.08.2016 ordered that in the interregnum, any action pursuant to the clarification bearing no.A-23011/25/2015-Ad.IIA dated 20.06.2016 (Annexure A/3) shall be subject to the final outcome of the OA. It is noticed that all the said OAs including the present OA were dismissed by this Tribunal vide its common order dated 22.09.2017 and 28.07.2017.

In the meantime, most of the applicants had retired on superannuation and immediately after dismissal of the said OAs, the respondents initiated the recovery by taking action pursuant to impugned order dated 20.06.2016. Accordingly, the respondents had re-fixed the pay of the applicants after

withdrawal of the benefit of 3rd financial up-gradation under MACPS granted to them wrongly. For the said revision of pay the respondents had issued notice to the applicants/concerned officers against which they filed their reply. However, the CBEC has not acceded to their appeal/reply mainly on the ground that applicants were not entitled for the 3rd MACP and due to pendency of litigation in the Court they could not initiate action for re-fixation of their pay and consequent recovery before their retirement. Aggrieved by it some of the applicants have filed separate OAs for waiver of recovery before this Tribunal such as OA No.219/2019 and other connected OAs. It is mentioned here that in the said OAs separate order has been passed in light above discussions.

**19** In light of settled legal position discussed and highlighted hereinabove, we do not find any reason to interfere with the impugned decision as there is no infirmity in the impugned order dated 20.06.2016. The present OA lacks merit. Hence, the applicants are not entitled for any relief as prayed for in this OA. The OA accordingly stand dismissed. No costs.

(A K Dubey)
Member(A)

(Jayesh V Bhairavia)
Member(J)

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